IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

JUDGMENT

SB CIVIL WRIT PETITION NO.3116/1995
Kastoor Chand & Ors. V/s The Board of Revenue & Ors.

Date of Order : : **September 22, 2006**

PRESENT
HON'BLE MR. JUSTICE P.S. ASOPA

Mr.Kamlakar Sharma, for the petitioner.
Mr.H.V. Nandwana, for the State.

By the instant writ petition, the petitioner has challenged the order dated 5.1.1994 passed by the Board of Revenue as well as order dated 31.12.1991 passed by Additional Collector, Kota and has further prayed that ceiling proceedings taken against Gopi Lal may be ordered to be dropped.

2. The facts, in brief, of the case are that ceiling proceedings under Old Ceiling Law were initiated against Gopi Lal and authorised officer SDO, Kota vide its judgment dated 30.12.1971 held that there was no surplus land in excess of the ceiling area and considering the fact of unequal partition amongst 7 co-parceners vide decree dated 7.8.1967 and further considering the fact that Dhanna Lal S/o Gopi Lal died 3 or 4 years back,

therefore, ceiling proceedings were ordered to be dropped. It has also come on record in the partition decree (Annexure-6) dated 7.8.1967 that on that date Dhanna Lal was alive, but on the date of passing of the said judgment dated 30.12.1971, he was not alive. On coming into force the Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973 (hereinafter to be referred as "the Act of 1973"), the ceiling proceedings were again initiated and vide order dated 26.4.1975, the SDO, Kota dropped the same on account of division of holdings between five share holders as per decree of the partition of the SDO dated 7.8.1967 and each share holder is having less than 30 standard acres of land. On 9.6.1980, the State Government re-opened the ceiling proceedings under the Old Ceiling Law culminated vide order dated 30.12.1971, being contrary to the provisions of Old Ceiling Law. The Additional Collector vide its order dated 4.3.1983 decided that Gopi Lal was having 117 standard acres of land in excess of the prescribed ceiling area and accordingly ordered for acquisition of the aforesaid land. The said order was challenged before the Board of Revenue and Board of Revenue vide its order dated 5.11.1984 set aside the order of the Additional Collector dated 4.3.1983 and directed that the matter be decided afresh. The Additional Collector, Kota, thereafter decided the case on 29.8.1989 wherein it was held that in all Gopi Lal is having 319 Bighas 17 Biswas of land which was ancestral land, out of

which he ordered that land measuring 17 Bighas 14 Biswas had come in the catchment area of the canal and therefore, deserves to be reduced. Finally, 302 Bighas 3 Biswas of land was taken into consideration. He further held that the land was ancestral and had been partitioned on 1.4.1966 between Gopi Lal and Smt. Kesar Devi widow of Gopi Lal, pre-deceased son Dhanna Lal as well as his grand sons Kastoor Chand, Devi Shanker, Badrilal, Ramkaran and Sahib Lal. He further held that total holding should be divided in two parts, one for Gopi Lal and another for pre-deceased son Dhanna Lal. He, therefore, held that so far as ancestral land belonging to the heirs of Dhanna Lal is concerned, their holding is less than the prescribed ceiling area, but Gopi Lal was holding 36.52 standard acre whereas he was entitled only for 30 standard acre, therefore, 6.52 standard acre land is in excess. The petitioner has further stated that during the course of hearing before the Additional Collector, Kota, Gopi Lal had expired, therefore, proceedings were continued by his daughter Dhanni Bai and heirs of Dhanna Lal. Against the order dated 29.8.1989 passed by the Additional Collector, an appeal was filed before the Board of Revenue and the Board of Revenue accepted the same vide order dated 29.7.1991 and set aside the order dated 29.8.1989 and remanded the matter to Additional Collector, Kota by pointing out the error of not calculating the standard acre as per classification of soil and otherwise also, an

enquiry regarding nature of the land whether the same is ancestral or not, is also required to be made and further report of the Tehsildar be taken into consideration. On remand, the Additional Collector, Kota passed an order on 31.12.1991 and held that the issue whether the case was to be reopened or not cannot be considered at this stage as the matter was remanded by the Board of Revenue with certain directions and as per direction, the calculation was made and it was held that total land is 73.03 standard acre, out of which, Gopi Lal had half share and half share is of widow of pre-deceased son Dhanna Lal and their sons. The land of Gopi Lal is 36.52 acres and he is entitled to retain 30 standard acre of land, therefore, 6.52 standard acre of land is surplus whereas the land held by widow of Dhanna Lal and her minor sons is less than 30 standard acre. Against the said order dated 31.12.1991, again an appeal was filed before the Board of Revenue and the Board of Revenue vide order dated 5.1.1994 has held that the issue whether the ceiling proceedings were dealt by the authorised officer or not, cannot be raised at this stage and as regard the land of Gopi Lal and his son Dhanna Lal of 73.03 standard acre was in joint khata, out of which share of Gopi Lal is 36.52 standard acre and 6.52 standard acre of land has been rightly declared surplus.

3. The State Government has filed reply and raised the objection that Dhanni Bai D/o Gopi Lal was not impleaded as party and further

supported the judgment of Board of Revenue.

4. The submission of Mr.K.K. Sharma, counsel for the petitioner is that the land in question was ancestral land, which was being managed by Gopi Lal as `Karta' of Hindu Joint Family. Gopi Lal, Dhanna Lal and his sons were coparceners of the said property since their birth and on appointed date i.e. 1.4.1966, the position was same and further the said coparceners have further exercised their right of severance and partition of the same by metes and bounds, therefore, they filed a suit for partition in the year 1966 and demanded their equal share in property, which was ultimately partitioned on 7.8.1967. The Revenue Authorities were under an obligation to decide the ceiling proceedings in accordance with the partition decree, which cannot said to be a transfer and is simple a separation of the joint right of coparceners' property and their individual right. Further submission of Mr.Sharma is that even in case it is assumed that decree of partition is not to be recognised on account of passing of the same after 1.4.1966 of unequal share then also as per Section 5 (17) and Rule 17 (4) of the Rajasthan Tenancy (Fixation of Ceiling on Land)(Govt.) Rules, 1963 (hereinafter to be referred as “the Rules of 1963”), notional share of each coparceners / co-sharers is to be determined. But, here in the instant case, notional shares have not been separately determined and in case they are separately determined then also as per Section 30 (B) of the

Rajasthan Tenancy Act, 1955 (hereinafter to be referred as "The Act of 1955") Gopi Lal was not having excess land on 1.4.1966.

5. The submission of counsel for the State is that there was in all 73.03 standard acres of land, out of which Gopi Lal was having half share i.e. 36.53 standard acres and whereas other half share was of the family of pre-deceased son Dhanna Lal and his widow and other family members. The Government Advocate also submitted that partition decree cannot be recognised for the simple fact that unequal partition have been made and that too, after 1.4.1966 i.e. the appointed date, to defeat the ceiling provisions. The Government Advocate has also submitted that co-parcener has no right to seek partition during life time of his father and grand father.

6. I have gone through the record of the writ petition and further considered rival submissions of counsel for the parties.

7. It would be worthwhile to quote the relevant provisions. Section 5 (17) & 30B of the Act of 1955 and Rule 17 of the Rules of 1963 which are as follows:-

The Rajasthan Tenancy Act, 1955

Sec. 5(17). "Holding" shall mean a parcel of land, held under one lease, engagement or grant, or, in the absence of such lease, engagement or grant, under one tenure, and shall include, in the case of an Ijardar or Thekadar, the ijara or theka area :

Provided that, for the purposes of

Chapter III-B, all parcels of lad held anywhere throughout the State by a person under one or more than one lease engagement, grant or tenure, and whether cultivated personally or let or sub-let by him, shall be deemed to be his holding and, where any such land is held by more than one person as co-tenants or co-sharers, the share of each of them shall be deemed to be his separate holding whether a division thereof has or has not actually taken place.

Sec. 30B. - Definitions. For the purpose of this Chapter -
(a) `**family'** shall mean a family consisting of a husband and wife, their children and grand-children being dependent on them and the widowed mother of the husband so dependent, and
(b) `**person'** in the case of an individual, shall include the family of such individual.

The Rajasthan Tenancy (Fixation of Ceiling on Land) (Govt.) Rules, 1963

Rule 17. Lands held by undivided family, society. - (1) For the purpose of determining the ceiling area, all the lands held individually, by any member of a family or jointly by some or all of the members of a family, shall be deemed to be held by the family.

(2) In calculating the extent of land held by a family or by an individual person the share of the member of the family or of the individual person in

> the land held by an Hindu undivided family, shall be taken into account.
>
> **(3)** In calculating the extent of land held by a family or by an individual person, the share of the family or of the individual person in the land held by a firm society or association of individuals (whether incorporated or not) or by a company shall be taken into account.
>
> **(4) The share of a member of a family or of an individual person in the land held an Hindu undivided family or the share of a family or of an individual in the land held by a firm, society or association of individuals (whether incorporated or not) by a company shall be deemed to be the extent of land which in case such share is held on the appointed date would have been allotted to such a member, person or family had such land been partitioned or divided, as the case may be, on such date; or which in case such share is acquired in any manner whatsoever after the appointed date, would be alloted to such member, person or family if a partition or division were to take place on the date of determination of ceiling area.**
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> (emphasis supplied)

8. The case was remanded twice by the Board of Revenue to the Ceiling Authorities for re-determination of the ceiling area. Once on 29.7.1991 and then again on 5.1.1994. The last remand order passed on 5.1.1994 was limited on the issue of classification of the land and

conversion of Bigha into standard acre as well as on the issue to make enquiry whether the land is ancestral. But the Additional Collector, Kota vide its judgment dated 31.12.1991, while holding the land ancestral further held that late Gopi Lal and late Dhanna Lal are having ½ share each, out of ½ share of Dhanna Lal his widow and sons are entitled for equal share 6.09 standard acre of land each. The land of 3 minor sons was clubbed with widow of Dhanna Lal namely Kesar Bai and land of two major sons was not clubbed, without any enquiry on dependency issue. Ultimately, it was held that minor sons and their mother has 24.36 standard acre land, which is less than 30 standard acres and major sons namely Kastoor Chand and Devi Shanker are also having the land less than ceiling area. It has been further held that Gopi Lal now remained alone in his family on notified date and was having 36.52 standard acres land. Since out of the ancestral land, Dhanna Lal has been separated, grand sons of Gopi Lal are not entitled for any share from the land of Gopi Lal and they have been given further share from the land of their father late Dhanna Lal along with their widow mother, therefore, they are not the members of the family of Gopi Lal. The relevant portion of the judgment of second remand order dated 5.1.1994 of the Board of Revenue and judgment dated 31.12.1991 of the Additional Collector, Kota are as follows:-

Relevant portion of judgment dated 31.12.1991 of

Additional Collector, Kota

"अप्रार्थी खातेदार के पास अधिसूचित दिनांक को किस्म जमीन के अनुसार कुल 73.03 स्टेण्डर्ड एकड भूमि बनती है जिसमे गोपीलाल का हिस्सा 1/2 एवं शेष 1/2 मे उसके पुत्र धन्नालाल की बेवा केसरबाई एवं उसके पुत्रों का अलग-अलग हिस्सा है जो 6.09 स्टेण्डर्ड एकड भूमि बनती है । चूकि केसरबाई के तीन पुत्र बद्रीलाल, रामकरण, साहबलाल नाबालिग है इसलिये उनके हिस्से की कुल 18.27 स्टे0 एकड भूमि व केसरबाई के हिस्से की भूमि6.09 इस प्रकार कुल 24.36 स्टेण्डर्ड एकड भूमि बनती है । कस्तूर चंद व देवीशंकर दोनों बालिग पुत्र है जिनके हिस्से की भूमि 6.09, 6.09 स्टेण्डर्ड एकड होती है । इस प्रकार नाबालिग पुत्रों की भूमि उसकी माता के साथ क्लब किये जाने पर कुल 24.36 स्टेण्डर्ड एकड होती है जो सीलिंग सीमा से कम है । बालिग पुत्र कस्तूरचन्द एवं देवीशंकर के पास भी भूमि सीलिंग सीमा से कम बनती है ।

अप्रार्थी गोपीलाल के धारण में उसके हिस्से की भूमि 36.52 स्टेण्डर्ड एकड बनती है एवं अधिसूचित दिनांक को उसके परिवार में अव मात्र वह अकेला एक सदस्य रह जाता है, **क्योंकि पैतृक भूमि में उसके पुत्र धन्नालाल की भूमि को अलग किया जा चुका है एवं जहां तक उसके पोत्रों की भूमि दिये जाने को प्रश्न है, उन्हें भूमि उनके पिता धन्नालाल की बेवा केसरबाई के हिस्से मे आई भूमि में दिया जा चुका है और अब वे अप्रार्थी गोपीलाल के परिवार के सदस्य भी नहीं रहे है ।** इस प्रकार अप्रार्थी स्वंय गोपीलाल के धारण में 36.52 स्टे0

एकड भूमि है एवं वह स्वयं अकेला सदस्य होने के कारण अधिकतम एक परिवार हेतु निर्धारित सीमा 30 स्टेण्डर्ड एकड भूमि रखने का अधिकारी है । इस प्रकार उसके पास सीलिंग सीमा से 6.52 स्टेण्डर्ड एकड भूमि अधिक होना पाया जाता है जो काबिल अधिग्रहण होने से अधिग्रहण किये जो के आदेश दिये जाते है । "

(emphasis supplied)

Relevant portion of judgment dated 5.1.1994 of Board of Revenue

"**गोपी लाल एवं उसके पुत्र धन्ना लाल के सयुंक्त खाते में 73.03 स्टे0 एकड भूमि बनती है और उसमें गोपी लाल का आधा हिस्सा है जो 36.52 स्टे0 एकड के बराबर आता है ।** अपीलाण्ट गोपी लाल का पुत्र धन्ना लाल है जिसका कि गोपी लाल के पूर्व ही देहान्त हो गया उस हिस्से को कोई विवाद नहीं है । गोपी लाल के परिवार में गोपी लाल केवल एक ही सदस्य था और वह 30 स्टे0 एकड भूमि तक ही धारित कर सकता था ऐसी अवस्था में उसके पास सीलिंग सीमा से 6.52 स्टे0 एकड भूमि अधिग्रहण करने योग्य थी जिसके लिये अतिरिक्त जिलाधीश ने आदेश देने में नियमानुसार कार्यवाही की है और उसके आदेश में इस अपील के माध्यम से हस्तक्षेप का कोई समुचित कारण अथवा आवश्यकता नहीं है । "

(emphasis supplied)

9. The Division Bench of this Court in case of **Amb Singh & anr. V/s Sub-divisional Officer, Bhinmal & Ors. - 1997 RRD 357** has held that partition of coparceners property is not a transfer where partition is to be worked out on the basis of equal share in the property. The relevant para 9, 10, 20 & 21 of the said judgment are as follows:-

> **"9.** The first question which requires consideration in the present case is : whether the partition of the co-parcenary property effected between the appellants on 21.1.68, is a `transfer' and can be recognised, considered and given effect-to for determining the ceiling area applicable to the appellants?
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> **10.** `Partition' is a division of the property between co-parceners / co-tenants resulting in individual ownership / tenancy of interest of each co-parceners / co-tenants; while `transfer' is an act of a party by which the title of the property is conveyed from one person to another. `Partition' under the Hindu Law, puts an end to the unity of the title, ownership and possession of the property between the co-parceners. In the partition there is a severence of joint status and of unity of possession between the co-owners / co-tenants. Partition neither creates any new title in a co-owner / co-tenant in the property nor is there any fresh acquisition of the property. It only enables the parties to know which particular property or portion thereof is their individual exclusive-share in the property. By partition

the subsisting joint title of the co-owner / co-tenant in the joint property transforms into their separate title in respect of the property which came to their share. In a transfer, the transferee acquires the right and title in the property which did not vest in him earlier. **Thus, `partition' of the joint property cannot be treated as a `transfer of the property' between individual co-parceners or co-tenants. Partition of co-parcenary property, therefore, cannot be regarded as a `transfer of the property' because the co-parceners have an antecedent right in the entire co-parcenary property.**

20. The next question which requires consideration is: whether the restriction under Section 30-DD relates only to the recognition to the transfers and not to the partition and the partition effected between the parties at any time can be considered for the purpose of determining the ceiling area applicable to all the persons or the family ? Section 30-DD does not deal with the partition. `Partition' for the purpose of determination of the ceiling area is covered only under Section 30-D and the recognition given under the ceiling law for the purpose of determination of ceiling area is only to those partitions which have been effected on or prior to the notified date, i.e., 1.4.1966. All other transfers, as per Section 30-D, except by way of partition or in favour of a person who was a landless person before the said date and continues to

be so till the date of transfer, are deemed to be in the transfers calculating to defeat the provisions of Chapter III-B and cannot be recognised and taken into consideration. Section 30-DD recognises special type of transfers limiting to thirty standard acres, made by a person upto 31st day of December, 1969; and (ii) the transfer to the extent of thirty standard acres made on or before the 1st day of June, 1970 of the land comprised in groves or farms of any nature referred to in Clauses (a), (b), and (e) of sub-section (1) of Section 30-J, made in favour of agriculturists domiciled in Rajasthan or in favour of his brother or son who have attained the age of majority on this day and are intending to take to the profession of agriculture and capable of cultivating the land personally. This Section has no application so far as the recognition of the partition for the purpose of determination of ceiling area is concerned. Partition is exclusively covered by Section 30-D of the Act.

21. The last question which requires consideration is : whether proviso to Sub-rule (5) of rule 17 applies to the present case ? It is not in dispute that as per the findings recorded by the learned Single Judge as well as by the tree Revenue Authorities, the partition of the holdings between the co-tenants (appellants) had not taken place upto the appointed date and it took place on 21.1.68. On the appointed date, the land was entered in the name of

> both the appellants as the co-tenants. **The land was ancestral and the appellants inherited the same from their father. As per the Hindu Law, being co-parceners, the appellants have equal share in the property. There is no doubt that at the time of partition the parties can agree to take unequal share; but since no partition was effected upto the notified date and on 1.4.66 the appellants were shown as co-tenants, they were, therefore, deemed to have equal share in the holding for which they were entitled being the co-parceners as per the Hindu Law. The learned Single Judge was, therefore, justified in applying the proviso to Section 5(17) of the Act and holding that both the co-tenants (appellants) are entitled for equal share in the land."**
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> (emphasis supplied)

10. In view of above, first submission of Mr.Kamlakar Sharma of non-consideration of partitioned decree by the Ceiling Authority is liable to be rejected on account of fact that the same was passed after the notified date and the shares were unequally divided (Annexure-6).

11. Now the question arises whether in case of ancestral land, a co-parcener is entitled for determination of deemed share as per Section 5 (17) of the Act of 1955 and Rule 17 (4) of the Rules of 1963? In the instant case, grand father as well as father were alive when the right of severance from ancestral land was exercised by grand sons.

12. The submission of Mr.Kamlakar Sharma is also that grand sons were entitled for their share by way of partition, otherwise also determination of their share in the ceiling proceedings. The authorities have ignored the provisions of Section 5 (17) of the Act of 1955 and Rule 17 (4) of the Rules of 1963, which are relevant for the purpose of determination of share of each member of the family and thereafter, clubbing the same after deciding the issue of dependency as per Section 30B of the Act of 1955.

13. There was a difference of opinion amongst Bombay High Court and other High Courts on the issue of seeking partition of ancestral joint property by the grand son / son during life time of grand father / father. The Bombay High Court in case of **Apaji Narhar Kulkarni V/s R. Ravji Kulkarni – (1892) ILR 16 Bom 29 (Full Bench)** by majority has held that son or a grand son cannot seek partition during life time of grand father/ father. The view taken in the said judgment has drawn the attention of learned Judges of other High Courts and the same was considered extensively along with other judgments of the parallel High Court like Madras, Allahabad etc. and ultimately, it was held by many High Courts that the said judgment is no longer good law in view of **AIR 1968 SC 1018 (Puttrangamma and Ors. V/s M.S. Ranganna & Ors.** wherein it was held that a member of joint family can bring about his separation in status by a definite unequivocal and unilateral declaration of his intention to

separate from the family and enjoy his share in severalty. Subsequently also, the other High Courts have held that in Hindu Law, there is no such restriction for exercise of right of separation by a co-parcener from joint family during life time of father / grand father. The relevant portion of para 4 of the said judgment is as follows:-

> "It is now a settled doctrine of Hindu Law that a member of a joint Hindu family can bring about his separation in status by a definite, uneqivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. It is not necessary that there should be an agreement between all the coparceners for the disruption of the joint status. It is immaterial in such a case whether the other coparceners give their assent to the separation or not. The jural basis of this doctrine has been expounded by the early writers of Hindu Law."

14. The Mysore High Court in a very lucid manner, considered the said controversy in case of **Devagya Tuklya and Ors. V/s Shivgya Igya and Ors. - AIR 1973 Mysore 4** and concluded that a son is entitled to seek partition of joint family property without the consent of his father. The relevant portion of para 7, para 10, 11 and 13 are as follows:-

> "7..... According to Justice Telang, a reading of the passage in Mithakshara which follows the above text would clearly show that the author of Mithaskshara did not at any time intend to impose a restriction on what was considered to be an unqualified nd well-known right of a coparcener to demand a partition which was recognised by placitum (5) which reads:

"यत्पितामहेन प्रतिग्रहविजयादिना लब्धं तत्र पितुः पुत्रस्य च स्वाम्यं लोकप्रसिद्वमिति कृत्वा विभामो डस्तिः।"

"In such property which was acquired by seizure or conquest by the paternal grand-father, the ownership of father and son is universally known and, there fore, partition does take place."

"10. Now turning to the decisions of other High Court, we shall first refer to the decision of the Madras High Court in (1894) ILR 19 Mad 179. In the said decision their Lordships referred to the decision of the High Court of Bombay in Apaji's case, (1892) ILR 16 Bom 29 (FB) and observed as follows:
"It was held by Sir Colley Scotland, C. J., and Bittleston, J., that a grand -son may be Hindu Law maintain a suit against his grand-father for compulsory division of ancestrail family property. The same view of the law under the Mitakshara was also taken by the Full Bench of the High Court of Allahabad in ((1883) ILR 5 All 430) and Viramitroda ya. Chapter II, Part 1,verse 23 is also cited in support of the decision. A similar view was also expressed in Laljeet Singh v. Rajcommar Singh ((1874) 12 Beng LR 373). We should have considered ourselves concluded by authority had it not been for the decision of the majority of the High Court at Bomay in (1892) ILR 16 Bom 29 (FB)). After carefully reading the judgments in that case and comparing them with the Mitashara and the

decision in Nagalinga Mudali v. Subbiramaniy Mudali, ((1862-63) 1 Mad HCR 77), we agree in the opinion of Mr. Justice Telang who has reviewed at length all the authorities on the subject and dissented from the conclusion arrived at by the majority of the Court.

In that case it was held that the son's right to demand partition from the father arose from the coparcenary right of the former by birth and it was confined to ancestral property because the son and the father conferred equal spiritual benefit upon the grand-father and ancestors and they had equal right in such property. Whilst in paternal property the father had a dominant right as its acquirer. It was further held that the suit for partition filed in circumsances similar to the case before us by the plaintiffs against their father and their uncles was maintainable. In the said decision, the relevant texts of Mithakshara were also considered in detail. In (1903) ILR 31 Cal 111, the view expressed by the Bombay High Court in Apaji's cse (1892) ILR 15 Bom 29 (FB) was dissented from and it was held that a **Hindu governed by Mithakshara Law was competent to maintain a suit for partition of ancestral properties even when his father and grand-father were both alive. Same is the view expressed in (1883) ILR 5 All 430. In that case the Allahabad High Court held that in a joint Hindu family governed by Mithakshara law, a grand-son had vested right in the joint family properties in the lifetime of his father and grand-father and that such interest was**

saleable in execution of a decree.

11. We shall now proceed to consider whether by the decision of the Supreme Court in Puttarangamma's case, AIR 1968 SC 1018 the view of the Bombay High Court in Apaji's case (1892) ILR 16 Bom 29 (FB) is impliedly over-ruled or not. In that case the Supreme Court has observed as follows:-

"It is now a settled doctrine of Hindu Law that a member of a joint family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. It is not necessary that there should be an agreement between all the coparceners for the disruption of the joint status. It is immaterial in such a case whether the other coparceners give their assent to the separation or not. The jural basis of this doctrine has been expounded by the early writers of Hindu Law. The relevant portion of the commentary of Vijnaneswara states as follows:-

(Text omitted)

And thus though the mother is having her menstrual courses (has not lost the capacity to bear children) and the father has attachment and does not desire a partition. Yet by the will (or desire) of the son a partition of the grand-father's wealth does take place. Saraswathi Vilasa, placitum 28 states:

(Text ommitted)

From this it is known that without any speech (or explanation) even by means of a determination (or resolution), only partition is

effected, just as an appointed daughter is constituted by mere intention without speech. "Viramitrodaya of Mitra Misra (Ch.II pl.23) is to the following effect:

(Test omitted)

Here too there is no distinction between a partition during the lifetime of the father or after his death and partition at the desire of the sons may take place or even by the desire (or at the will) of a single (coparcener) Vyavhara Mayukha of Nilakantabhatta also states:

(Test omitted)

Even in the absence of any common (joint family) property, severance does indeed result by the mere declartion `I am separate from thee because severance is a particular state (or condition) of the mind and the declaration is merely a mainifestation of this mental state (or condition)."

(underlining by us)

A reading of the above passage from the decision of the Supreme Court would show that the right of a member of coparcenary to demand a partition at his own will and without the concurrence of the other coparceners including the father is well recognised. It should, therefore, be held that the view of the High Court of Bombay in Apaji's case (1892) ILR 16 Bom 29 (FB) stands impliedly overruled. At this stage we may refer to a decision of the Privy Council in Shiba Prasad Singh v. Rani Prayag Kumari Debi, AIR 1932 PC 216 in which Sir Dinshah Mulla speaking for the Judicial Committee observed as follows:-

"In the case of ordinary joint family

property, the members of the family have: (1) the right of partition: (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance and (4) the right of survivorship."

It is, therefore, clear that the right of partition is considered as a necessary incident of the co-ownership of property by members of a Hindu joint family. The above decision of the Privy Council must also be considered as having superseded the opinion expressed in Apaji's (1892) ILR 16 Bom 29 (FB).

13. In conclusion, we are of the opinion that the majority opinion in Apaji's case (1892) ILR 16 Bom 29 (FB) does not lay down the law correctly and we hold that the suit in the instant case is maintainable. This, however, does not dispose of the controversy between the parties in this case. The lower appellate Court has not given its findings on other issues which had been raised in the suit. We therefore, set aside the judgment and decree passed by the lower appellate court and remand the case to it to record its findings on the other issues and to dispose of the case in accordance with law."

(emphasis supplied)

15. The Bombay High Court in case of **Narayan Ramchandra Katkar & Ors. V/s Arjun Bhimrao Gore & Ors. - AIR 1986 Bombay 122** has also held that Apaji's (supra) is no longer good law in view of AIR 1968

SC 1018. Similarly, Bombay High Court again in case of **Dr.Nilkanth Krishnarao Apte V/s Dr. Ramchandra Krishnarao Apte & anr. - AIR 1991 Bombay 10** held that suit for partition by a son during life time of his father is not barred. The relevant para 11 of the said judgment is as follows:-

> "11. The problem now arising is whether Viraj is entitled to sue during the lifetime of his father. Father and son both claim that the latter had the former's assent to sue for partition. R.K. Apte has in fact admitted that he instigated the suit by Viraj. That is not difficult to believe having regard to the insatiable greed of the gentleman. Having negatived the plea of a severance of status in 1952 and the only difficulty about father's consent not surviving, it has to be held that R.K. Apte's being alive constitutes no imediment in the path of Viraj to sue for partiion. **That apart, the authority (1892) ILR 16 Bom 29 (FB) requiring the father's consent to a suit for partition by a son, is no longer good law. Madhav Reddy, C.J. has so held in the case of Narayan v. Arjun, AIR 1986 Bom 122 on the basis of AIR 1968 SC 1018. Issue A4 does not survive in view of the subsequent joinder of Viraj's mother."**
>
> (emphasis supplied)

16. In view of judgment of Supreme Court and subsequent High Courts, it is well settled that grand son / son can seek partition of the ancestral joint Hindu property during life time of his father / grand father. Equally, in the

ancestral property, the share of the grand son / son, which he acquired by birth is to be determined before determination of the ceiling area entitle to retain by a family as defined under Section 30B of the Tenancy Act. The submission of Government Advocate is that grand son / son cannot seek partition has no force.

17. The Additional Collector, Kota has given share to the grand sons of late Gopi Lal from the ½ share of their father Dhanna Lal, who died, but in case of ancestral land, son and grand sons being co-parceners were entitled for their individual equal share irrespective of death of father after 1.4.1966 from the entire ancestral land. From the record, it appears that there were 7 co-parceners on 1.4.1966. The Division Bench of this Court has made distinction between the property held by father and devolved on the death is not applicable in case where holding was ancestral. The relevant portion of the said judgment in case of **Smt. Man Kanwar V/s State of Rajasthan – 1978 RRD 375** is as follows:-

> "5. The decision of the Board of Rvenue in State of Rajasthan V. Shiv Dan Singh - 1977 RRD 233 and in State of Rajasthan V. Moola and others - 1977 RRD 95, are clearly distinguishable on facts. **It is well settled that where an agricultural holding belongs to the father, the tenancy rights devolve on the children whether major or minor only on the death of their father. But that principle can have no application**

> **in a case like the present where the holding was ancestral in the hands of the father."**
>
> (emphasis supplied)

18. The Additional Collector, Kota has only determined the share of each member of 6.09 Standard acres out of land to be retained by family of Dhanna Lal, but not their share as grand son from the entire ancestral property held by Gopi Lal. The Additional Collector, Kota ought to have determined the notional equal share of each co-parcener from the entire ancestral property as per Section 5(17) of the Act of 1955 and Rule 17 (4) of the Rules of 1963, but by not doing so, he has committed an illegality, therefore, the said judgment dated 31.12.1991 is liable to be set aside.

19. The another illegality committed by the Additional Collector is that he has simply excluded the major member from the family of Dhanna Lal and included the minor members, which is contrary to the provisions of Section 30B of the Tenancy Act, according to which, an enquiry in this behalf is necessary because a major may be dependent on account of deformity and a minor may be independent as held by this Court in case of **Hari Om & anr. V/s The State of Rajasthan & Ors. - 2006 (3) WLC (Raj.) 460.** The relevant para 27 & 28 of the said judgment are as follows:-

> "27. Out of aforesaid judgments, one D.B. Judgment Jugal Kishore & Ors. Vs S.D.O., Baran & Ors reported in 1988

(2) RLR 595 was consistently followed by the Court and the relevant para Nos. 5 and 6 of the same are as under–

"*5. In view of the above proposition of law, we are of the opinion that the subordinate authorities fell in error in not giving any finding as to whether the property in the hands of the petitioner, Radha Vallabh was ancestral; and further that both the authorities did not care to inquire into a question as to whether the sons of Radha Vallabh (petitioner) were dependent on their father or not, when it was specifically claimed by Radha Valabh that partition has taken place and individual share has been allotted to each of the co-parceners (sons of Radha Vallabh, petitioner), in as much as the subordinate authorities clubbed the share of Nand Kishore with the land occupied by Radha Vallabh, petitioner.*

6. The word dependent appearing in Section 30B of the Act is of wider connotation. A child below 18 years of age by very reason of his or her age and relationship seeks support and maintenance from his or her parents. Legislature by using the word dependent also meant to include a major child who is unable to look after himself or support himself because of imbecility, deformity or other handicap or any other reason, whether a child is member of family or not. One need not be concerned with the question whether child is a minor or major for in either case according to the definition, he would be a member of the family if he is

dependent on his parents.

28. **As per the aforesaid Division Bench judgment, the enquiry is necessary in case the minor son is shown independent or the major son is shown as dependent on account of imbecility,deformity or other handicap or any other reason. Thus in both the aforesaid type of cases the enquiry is necessary.** The same view has been taken by this Court in other reported/unreported judgments cited by the counsel for the petitioners, therefore, it is not necessary to discuss each of them."

(emphasis supplied)

20. The Board of Revenue has also committed an error apparent on the face of record that when the land was ancestral then grand father / father and grand son, all will have equal share, but still gave perverse finding contrary to the record and law that the land was in the joint Khata of father and son i.e. Late Gopi Lal and late Dhanna Lal. There is nothing on record to show that land was in the joint Khata. The case of the petitioner was through out that the land was ancestral and the Additional Collector, Kota also held it to be ancestral vide order dated 31.12.1991, which was under challenge before the Board of Revenue, therefore, the judgment of Board of Revenue dated 5.1.1994 is liable to be set aside.

21. It is made clear that each co-parcener will not be entitled to retain

their share as their independent holding but while dealing with the determination of ceiling area as per definition of family, each family is entitled for 30 standard acre of land and those who are part of the family, their land have to be clubbed and then family will be entitled for retention of 30 standard acres and rest of the land is to be declared surplus.

22. In the result, the writ petition is partly allowed. The judgment of Board of Revenue dated 5.1.1994 and judgment of Additional Collector, Kota dated 31.12.1991 are quashed. The case is remanded back to the Additional Collector, Kota to determine

(i) notional share of each co-parcener in the ancestral property as on 1.4.1966, according to Section 5 (17) of the Rajasthan Tenancy Act, 1955 and Rule 17 (4) of the Rajasthan Tenancy (Fixation of Ceiling on Land) (Govt.) Rules, 1963;

(2) to determine the family units as on 1.4.1966; and

(3) after deciding the issue of dependency, the total ceiling area to be retained by family unit(s) and surplus land is to be determined of the family unit(s).

23. The aforesaid exercise be completed within a period of six months from the date of receipt of this order.

(P.S. ASOPA) J.

ummed/-